IN THE HIGH COURT OF JUSTICE OF THE F.C.T.

IN THE ABUJA JUDICIAL DIVISION

MAGISTRATE APPEAL

HOLDEN AT COURT NO.8 NYANYA-ABUJA

ON FRIDAY, THE 29TH DAY OF MAY, 2020

BEFORE: HON. JUSTICE U.P KEKEMEKE(PRESIDING JUDGE)
HON. JUSTICE K. N. OGBONNAYA

JUDGE

SUIT NO.: FCT/CVA/295/18

BETWEEN:

UGBEDE ITODO .....APPELLANT

AND

AMINU YAHAYA .....RESPONDENT

JUDGMENT

In this case the Appellant Ugbede Itodo is challenging the Judgment of the lower Court delivered on the 13th day of September, 2018 in which the Court dismissed his case. This was done in a Notice of Appeal filed on 12/10/18. In it.

According to him, he entered into agreement- With the Respondent Aminu Yahaya. The Crux of the appeal is that he was not allowed to Cross-examine the DW1 a subpoenaed witness who tendered a statement of Account allegedly belonging to him. He in turn tender Exhibit 04 through the Respondent during Cross-examination. The lower Court thereafter delivered its Judgment and dismissed its case without allowing him to exercise his right to be heard-Cross examination of the DW1. He also claimed that the Trial Judge recorded wrongly the fundamental part of his testimony during hearing and made findings on those wrong records. He made improper evaluation of Exhibit D1-D3.

In the grounds of Appeal he sought for the following Reliefs:

An Order to set aside the said judgment of the lower Court delivered on the 13/9/18. He also wants an Order granting the admission of the indebtedness by the Respondent to him. In the alternative he want an Order granting him the sum of N400, 000 = which he claims in the sum voluntarily admitted by the Respondent that he owed him. And another Order to remit the Suit for trial de novo by another Judge of co-ordinate Jurisdiction as the Trial Judge.

In his brief of Argument he raised 11 issues for determination which are:

1. Whether the proper legal procedure was adopted before Exhibit D1 was admitted. Exhibit D1 is the statement of account of the Appellant.
2. Whether his right to fair hearing was breached when the trial Judge refused him to cross- examine the DW1 who tendered the Exhibit D1.

3. Also whether the said Judge erred in law when he dismissed the Suit despite the weight of evidence that were admitted in evidence without any objection by the respondent.
4. Furthermore whether the Judge erred in law when he recorded in his Record of proceeding his testimony different from what he testified under Oath.
5. Also whether it is the law and expected for the documents tendered by an adverse party to be in support of the opposing party.
6. Whether the Judge erred in law when he failed to evaluate Exhibit A,B,C,C(1) and D 4 which are documents tendered in evidence by him and admitted by the court without any objection from the Respondent.
7. Whether the Judge erred in law when he held that Appellant's was economical and unreliable for Court to believe and act on.
8. Also whether his application for a Plaint at the lower Court is same as his witness statement on Oath.
9. Whether the said statement on Oath and statement of Defence (pleadings) are filed at the lower Court and the legal import where the Respondent failed to adopt same during hearing of the substantive Suit.
10. Also whether both parties were bond by the terms of their Agreement
11. Whether the Judgment was against the weight of evidence before the lower Court.

He want Court to set aside the Judgment of lower Court, grant his relief and grant an admission of the admission of indebtedness or alternatively grant N400,000 allegedly admitted by the Respondent that he owed Appellant or remit the case for trial de novo.

ON ISSUES 1 & 2:

He submitted that the manner in which the statement of Account-Exhibit D was procured and admitted was not proper in law. That it is wrong for the Court to Order for the Account of the Appellant to be produced upon application of the Respondent without issuing any notice to produce to him which is contrary to the provision of Section 911 Evidence Act 2011. That he was never put on notice as required by law to produce the said Account statement.

That by grant of the Respondent's application to produce the said documents in Court made the document to be exposed to the public. that not allowing him to Cross-examine the DW1 and the subsequent admission of the document worked manifest injustice against the interest of his right to fair hearing against the provision of Section 36(1) 1999 Constitution as amended. That the certification of document by Zainat Edogbanya a customer service officer of the Jaiz bank is wrong in law. As she is not competent to certify the authenticity of the document. He referred to the case of:

ACB VS OBA (1993) 7 NWLR (PT 304)173

OLATUNDE & CO VS NBN LTD (1995) 3 NWLR (PT385) 550

That none of the parties made use of the documents in prove of their respective cases or relied on it. He referred to the case of.

HNB Vs Gift Unique (Nig) LTD (2004) 15 NWLR (PT.896) 408 @ 412

He urged Court to hold that Exhibit D1 has no substance to the adjudication of the case at lower Court and decide the and decide issue 1 & 2 in his favour.

ON ISSUE NO. 3 & 6:

The appellant submitted that it is settled law a party succeed on the strength of his case and not on the weakness of the defence. He cited the case of:

EMENIKE Vs PDP (2012) 12 NWLR (Pt.1315) 556

That during proceeding he tender documents in proof of his case. The documents were all admitted without objection from the Respondent. That Exhibit A is the undertaking given to him by the Respondent. Exhibit B is the cheque of Jaiz Bank for N 1 Million Naira issued to him by Respondent as assurance money to him any time he requested for it. While Exhibit C (1) is the undertaking dated 11/9/15 by Respondent. C (2) is another cheque from Jaiz bank from Respondent. And Exhibit D is official receipts of appellant's solicitor dated 18/10/17. That Exhibit D4 is the further admission by the Respondent of his indebtedness to the Appellant before the action was filed at the lower Court. The document was tendered at lower Court by him through the Respondent. That the Judge failed to evaluate the said uncontroverted evidence-(Exhibit D4) and did not make any pronouncement on it in the Judgment. Rather the Judge stated that the transactions on Exhibit D1, D2 and D 3 (i)-(iv) do not support the case of the Appellant. That it is a well established principle of law that Court that court have been disposed to act on an uncontroverted evidence. He referred to the case of:

ADELAKIN VS ORUKU (2006) LPELR-7681(CA)

Where it was held that Court is bound to act on uncontroverted and unchallenged evidence once the party was given every opportunity to so challenge the evidence. He referred to:

NZERIBE Vs DARE ENG.CO.LTD (1994) 8 NWLR(PT. 361) 124

That all the documentary evidence tendered by Appellant at the lower Court were unchallenged by the Respondent. That such unchallenged evidence remains good and credible and ought to be admitted and used by the Court. He referred to the case of:

CHIEF OJO VS SAULA OGISANYI ANIBERI & 7 Ors (1999) 11 NWLR (PT.638) 630@ 637

That the Judge failed to make evaluation of those documents tendered in evidence by Appellant. That once such document are admitted in evidence, it forms part of the record and Court is duty bound to look at it and to evaluate same and make definite pronouncement on it. He referred to the case of:

ARABAMBI Vs ADVANCE BEVERAGES INT'L LTD (2006) ALL FWLR (PT295) 581 SC

AGABI Vs KABIRA (2010) ALL FWLR (PT.544) 132CA

He also referred to Section 232 Evidence Act 2011 and urged the Court to find for him on the issue raised.

That the evidence of a party by will not necessarily support the case of the opponent. Again that it is not proper for the Judge to make an assessment on behalf of a party in a contested Suit. Which the party did not make himself. That the Judge overstepped its boundary when it held that the payment from the Defendant to Plaintiff goes far beyond the claim of the Plaintiff. Which was not the testimony of the Respondent at the Trial. That the Respondent never in the course of the Trial referred to particulars of his transaction with Jaiz Bank yet the Judge made evaluation on the Exhibit D1, D2 and D3 (i)-(iv) when the Respondent did not make any reference by oral evidence on those

Exhibits. He submitted that its not for the Court to fix these documents tendered on the evidence. He referred to:

OMISORE Vs AREGBESOLA (2015) 15 NWLR (PT.1482) 205@333

That the Judge erred in law when he attributed evidential value to Exhibit D1-D3(i)-(iv) which were dumped by Respondent without leading any oral evidence to support or substantiate them.

On the failure of the Appellant to mention the N500,000 which Respondent returned to the Appellant was an attempt by Appellant to deceive the lower Court, the appellant submitted that the said N500,000 was not in issue at the lower Court. That the trial Judge misconstrue himself though the Respondent did not make any reference to the said Exhibits. Hence it was not possible for him to raise it. He urge the Court to set aside the findings of the lower Court.

ON ISSUE NO.4:

When the Judge recorded in the Record of Proceeding the testimony of the Appellant different from what he testified under oath. He submitted that party in a proceeding in the lower Court may wish to challenge the Record of Proceeding on ground that it does not truly represent what transpired during the proceedings: he referred to:

NUHU Vs OGELE (2003) LPELR-2077(SC)

He referred to section 168(i) Evidence Act 2011 that they challenged said record and have served on both the Registrar of the lower Court as well as the Judge, the Affidavit challenging the said proceeding. That in his Motion on Notice filed on 12/10/18, they attached the said Affidavit as Exhibit E. that that is done in

compliance with the Section 168 Evidence Act and the decision in the following case:

UGBE Vs CHUKWUSE & ORS Supra

UBA Vs SAMUEL IGELLE UJOR (2001) 10 NWLR (PT.722) 89

He urged the Court to consider the attached Affidavit of Record of proceeding which is unchallenged and to hold that the wrong recordings of the trial Judge of the oral evidence of the applicant occasioned miscarriage of Justice as the lower Court made wrong findings based on the records at the lower Court.

ON ISSUE NO.5:

On whether documents tendered by the adverse party to be, in support of the opposing party's case. He submitted that he tendered Exhibit A-D4 that he tendered Exhibit D4 through the Respondent. that all those documents were not challenged by the Respondent during cross-examination.

That Exhibit D4 was tendered by him to show that the Respondent admitted liability to him on certain amount. But the Judge held that Exhibit D4 only admits that Defendant/Respondent is indebted to Appellant to the tune of N400,000.

That the decision of the Judge that the transaction on D1-D3 (i)-(iv) did not support the appellant case is unknown to law and the documents are all tendered by the Respondent. That the judge used the evaluation against the case of the Appellant. The Court should have evaluated all the documents tendered by the parties especially those tendered by him in prove of the case before the court. he referred to:

ARABAMBI Vs ADVANCE BEVERAGES (SUPRA)

AGABI Vs KABIRA (2010) ALL FWLR (PT>544) 132 CA

He urged the Court to so hold and upturn the decision of the lower Court.

ON ISSUE 11:

On whether the Judge erred when he held that Appellant's was unreliable and economical for it to believe and act on. He submitted that despite the Exhibit A-D & D4 he tendered which were not objected to by Respondent at the lower Court and the Appellants oral evidence the Judge still held that he was economical with the truth. That it was the Respondent who concealed evidence and was economical with the truth facts of the case. That Respondent hid the existence of Exhibit D4. That he tendered same yet the Judge ignored the said Exhibit 4 and did not make any evaluation of the said Exhibit D. that the Judge erred in law by saying that the appellant was economical with the truth despite the overwhelming evidence tendered by him which included all the documents issued to the Appellant by the Respondent. that the Judge was supposed to make findings on each of the documents tendered in evidence. He urged Court to hold that he was not economical with the truth.

ON ISSUE 8 & 9:

On whether the Plaint at the lower Court is same as witness statement on oath and the legal import where the Respondent failed to Statement on oath and his statement of Defence at the lower court during hearing at the lower Court.

He urged Court to hold that the said statement of Defence filed by Respondent was of no legal consequence. That like the Respondent he did file or adopt any statement on oath but only

testified orally in proof of his case. That the Judge lifted Paragraph 8 of his Plaint in isolation to reach his decision which Appellant is Challenging in this case. That the parties that they would share the proof accrued from the Defendant's business. That Respondent did not Challenge that the Judge failed to consider and evaluate the totality of the evidence of the Appellant in proving his case but he held "that contradiction in Appellant (PW1) evidence does not support Paragraph 8 of particulars of claim". He urged Court to make pronouncement on how pleading are filed in the lower Court.

ON ISSUE 10:

Whether the parties are bound by their Agreement they have entered into, he submitted that they are so bound in this case since there is nothing to show that such agreement was obtained by fraud; mistake or deception. He referred to the case of:

GAS OFORISHE Vs Nig. Company LTD (2018) LRCN 106 @ 122

A-G RIVERS STATE Vs A-G AKWA IBOM (2011) 3 SC 1

That he did not obtain Exhibit A though any vitiating element but that it was voluntarily issued to him by the Respondent. So also Exhibit B was issued by Respondent as an Assurance of the Respondent's commitment in Exhibit A. that it was on the basis of the two Exhibits A & B that he proceeded to contract with Respondent upon those agreed terms in Exhibit A that the Judge erred when he did not restrict himself within the terms of the agreement in his Judgment. He urged the Court to hold that the agreement of the parties in this case is binding on them.

ON ISSUE NO.11:

That the Judgment was against the weight of evidence, he submitted that when an Applicant/Appellant complains that a Judgment is against weight of evidence it means that when such evidence is weight against the evidence of the Respondent, Judgment give in favour of Respondent is against the weight which should have been given to the totality of all the evidence before the Judge of facts.

AKINLAGUN Vs. OSHOBOJA (2006) ALL FWLR (PT.325) 53 SC

He submitted that the said Judgment cannot be justified by the weight of evidence put forth by Respondent before the Judge. He cited:

ATAYI Vs FARM LTD Vs NACB (2003) FWLR (PT.172) 1864 CA

He challenged the finding of the lower Court and urged this Court to set it aside as the finding is not supported by the weight of evidence placed by the Court as it is not supported by weight of evidence. He referred to the case:

NNEJI Vs CHUKWU (1996) 12 SCNJ 388 @ 400

That the lower Court was bound to look at the Exhibit's which forms part of the record of the Court. That the Court is bound to evaluate it and make definite pronouncement on it. That Respondent should not be allowed to use unsubstantiated oral evidence to vary the terms of the agreement he has with the Appellant. He cited:

EGBAREVBA Vs OSAGIE (2010) ALL FWLR (PT.513) 1255 SC.

He urged the Court to depart from the general Rule that Appellant Court is not to interfere with the findings of the lower Court. He urged Court to hold that the Judgment was against the weight of

evidence placed before the trial Judgment. And to hold that the Judge erred in law by assuming jurisdiction over the Suit of the Respondent as presently constituted. He urged the Court to set aside the said Judgment.

The Respondent filed a 39 paragraph brief of argument which included the argument in the Notice of Preliminary Objection filed in the said brief the Respondent has raised objection challenging issues NO. 8 & 9 of the Appellants brief of Argument as well as Ground NO.4 of the Notice of Appeal. Issue 8 & 9 are whether Appellants Application for plaint is same as witness statement on oath and whether statement on oath and statement of Defence are filed at lower Court and the legal implication where Defendant/Respondent failed to adopt since during hearing; respectively.

GROUND NO 4. In the Notice of Appeal is that the lower Court recorded wrongly the fundamental points of the Appellant's testimony and findings on the wrong records.

In the Preliminary Objection he raised 2 issues for determination which are:

1. Whether the Appellant was right to formulate issue 8 & 9 that cannot be tied or traced to any ground of the notice of Appeal.
2. Whether Appellant can completely raise fresh grounds/issues without seeking and obtaining the leave of Court.

ON ISSUE NO 1: the Respondent submitted that issue which do not show from the ground of Appeal are incompetent as such must be struck out. So also grounds of Appeal that raise fresh points can only stand after leave of Court is sought and obtained.

BAREWA Vs OSOBA (1997) 3 NWLR (PT.492) 164@181

That issue 8 was distilled from ground NO.9 that issue 8 & 9 have no bearing on ground 9 from where they were distilled. That the complaint of ground 9 is on the trial Judge isolating the plaint while appellant issue were forced of the import of witness statement on oath and statement of Defence. That those issues did not resolve the question of whether the trial Judge was right to have isolated the particulars of Plaint in the Judgment which is the Appellant's grouse in Ground 9 of the Notice of Appeal. Again 2 issues cannot be formulated from one single ground of Appeal. That Plaintiff was wrong in doing so in this case. He urged Court to so hold. He relied on the cases of:

BARIDAM Vs THE STATE (1994) 1 NWLR (PT.320) 250

ONIAH Vs ONYIAH (1989) 1 NWLR (PT.99) @514

NWOSU Vs UDEAJA (1990) 1 NWLR (PT.125) 188

ON ISSUE NO.2

On whether Claimant can competently raise fresh ground/issues without leave of Court had and obtained he submitted that the Appellant never sought and obtained leave of Court before raising the fresh issues and points in issue 8 & 9. That the issues thereon were never raised on Appeal without the leave of Court. The same applies to Ground 4 of the Notice of Appeal. That the Appellant's failure to seek and obtain leave before raising the issues as stated above make those issues incompetent. He relied on the following cases:

UBA Vs YAWE (2002) 8 NWLR (PT.670) 739 @778

OSHO Vs APE (1998) 8 NWLR (PT.562) 249

DAHIRU Vs KAMATE (2001) 11 NWLR (PT.723)222 @ 232-233

He urged Court to strike out Ground 4 of the Notice of Appeal as well as issue 8 & 9 of the Appellant's Brief of Argument and all the argument canvassed in support therein.

He also urged the Court to hold that all those are incompetent and should be struck out. In the Respondent Brief of Argument he raised 4 issues for determination which are.

1. Whether the Trial Court was right to hold that person subpoenaed to produce documents only (Account statement of appellant cannot be cross-examined by the Appellant's Counsel and accordingly admitted the document in evidence (based on ground 1 & 2)
2. Whether the Court was right to hold that Appellant could not prove his claim against Respondent and accordingly dismissed the said Claims. (Distilled from Grounds 3, 8, 9, 10 & 11).
3. Whether the Court properly evaluated all the evidence and exhibit admitted at the trial before dismissing the said Claims of the Appellant (from Grounds 5, 6 & 7).
4. Whether this Court being an appellant Court is bound by the Record of Proceedings/Appeal from the trial Court. (Distilled from ground 4)

ON ISSUE NO.1 whether subpoenaed witness should not have been cross-examined by the Appellant's Counsel before document is admitted he submitted that DW2, the subpoenaed witness who came to produce a document- statement of Account of the Appellant, could not be cross-examined by the Appellant's Counsel. That the trial Judge was right in not allowing the cross-examination of the DW2. Who is a staff of Jaiz Bank. Who only come to tender the said statement of Account and nothing more.

He referred the Court to the Section 218 & 219 evidence Act 2011 as amended and the case of:

EDOHO Vs A-G AKWA-IBOM STATE (1994) 1 NWLR (PT.425)488

IBRAHIM Vs OGUNLEYE & ORS (2010) LPELR (CA)

FAMAKINWA Vs UNIVERSITY OF IBADAN (1992) 7 NWLR (PT.255) 608

That the submission of Appellant that he was not allowed cross-examine the DW2 who tendered Exhibit D1, is misguided and misconceived. That the said judgment should not be faulted on that ground. That the submission of Appellant that the presentation of the statement of Account is a violation of the customer-Banker relationship cannot stand. That the bank did not breach any customer Bank relationship as erroneously cleared by the Appellant; when the said Account statement was printed, without notice to and consent of the appellant same also goes to the Appellant's submission on the agreement that the person that certified the said statement of Account was not qualified to do so and as such contrary to Section 84 of Evidence Act 2011. That Section 84 Evidence Act 2011 does not depend on competence of the person who certified the documents. That the Court was right in its decision on that in the said Judgment and even before admitting same evidence. That appellant is not in a position to challenge the competence of the said Officer who is a staff of and schedule Officer to do so. They urged Court to so hold. That appellant has not shown that admission of the document has not occasioned miscarriage of Justice.

RABIU Vs MAGAJI (2011) FWLR (PT.580) 1384

ON ISSUE NO 2: On Appellant not being able to prove his claim and Court dismissing same he submitted that Appellant could not adduce enough evidence to prove that Respondent was indebted to him to the tune of N640,000 as amount due or the N760,000 as interest which the Respondent was allegedly failed to remit to Appellant over a period of 12 months before the Suit was instituted against Respondent. That the Respondent had in his testimony and statement of Account tendered Exhibit D1 shown that he remitted more than N1 Million – a total of N1, 191,000.00. That the Appellant did not challenge or controvert that fact and as such the fact remains uncontroverted throughout the trial and are therefore deemed admitted. He referred to:

IFEAJUNA Vs. IFEAJUNA & ORS (1997) 7 NWLR (PT.513) 405 @428

That the trial Judge is right in dismissing the Appellant's claim for want of proof. After all, he who asserts must prove. He urged court to so hold and resolve the issue in his favour. He supported the above with the following cases:

GREEN Vs. GREEN (1987) 3 NWLR (PT.61) 480 (SC)

OGBECHIE Vs. ONOCHIE (1988) 1 NWLR (PT.70) 370 (SC)

ON ISSUE 3:

Whether trial court evaluated all evidence before it before dismissing the claims of the Appellant, he submitted that trial court properly evaluated the evidence of the parties before dismissing the claims of the plaintiff. That appellate court has no reason to interfere with the same and also carefully examined the exhibits tendered by the parties too before dismissing the claim of the Appellant for lack of credibility. He referred to the case of: OKEKE Vs. EZIKE (1993) 4 NWLR (PT.290) 751 @765.

That it is the duty of the court to consider all evidence placed before it and not the duty of the counsel for Appellant. Again the evidence by all parties are evaluated. The Appellant failed to support his case with credible and convincing evidence in support of his claims which was why the trial Judge dismissed his claims. After proper and thorough evaluation of the evidence before the court, they submitted that this court cannot intervene by re-evaluating the said evidence in this appeal, as there is no course for that. He referred to the case of:

SAWUTA Vs. NGAH (1998) NWLR (PT.580) 39 @48.

That it is not for court to grant a relief not sought for or a relief not specifically claimed or proved. He referred to:

OYEYEMI Vs. OWOEYE (2017) 12 NWLR (PT.1580) 364 @416. (SC)

That the Court was right in not granting the claim since Appellant failed to prove his relief as contained in his particulars of claims. He urged court to resolve Issue 3 in the Respondent's favour.

ON ISSUE NO 4:

Whether this Court as appellant Court is bound by the record of proceedings of the Trial Court, the Respondent submitted in his agreement at the Ground 4 of the appellant's Notice of Appeal and Issue No.4 formulated there from, that it is a fresh Issue and that the Appellant did not seek the leave of trial court or this court before raising it. That it is trite that the appellate court is bound by the record of the trial court. He cited the case of :

TEXACO PANAMA INC. Vs. SHELL PDCN LTD (2002) 5 NWLR (PT.759) 209 @234.

That they agreed with the appellant counsel submission that when a party intends to challenge the correctness of Records of Proceeding, the normal procedure is to swear to an affidavit challenging the said record of proceeding. That they disagree with the submission of the Appellant counsel that this court should rely on the records of proceeding by the counsel to the appellant- C.J. Dimgba Esq. which challenged the record of the trial court which is attached as Exhibit on the appellant's motion- M/125/18 dated 9/10/18 filed on 12/10/18.

That the said motion and all the Exhibits attached therein do not form part of the Record of Appeal m the trial court to this court. That appellate court cannot go outside the Record of Proceeding to search for evidence. That appellate court relies on and is bound by the Record of Appeal to decide the Appeal. He referred to the case of:

OKPOKPO Vs. UKOTE (1997) 11 NWLR (PT.527) 94 @115.

That there is no record of proceeding compiled by the appellant counsel which can be compared with the record of the trial court. There is equally no Affidavit filed to that effect. He urged court to hold that trial did not record the evidence the of the appellant wrongly.

That by virtue of Section 168 (1) Evidence Act. He cited the case of EZE CHUKWU Vs. ONWUKA (2016) 5 NWLR (PT.1506) 529 (SC).

That the Appellant failed to show which part of his oral evidence the court wrongly recorded and how the purported record of his evidence has influenced the judgment of the trial court to occasion a miscarriage of justice against him. He urged court to hold that Court properly recorded the evidence of the Appellant

as contained in the Record of Appeal. And that no injustice was occasioned to the Appellant in the said Judgment. He urged court to resolve Issue NO.4 in favour of the Respondent.

In summary the respondent based on the plethora of judicial authorities cited urged the court to dismiss the Appeal with substantial cost for lacking in merit based on the following points:

1. That a witness subpoenaed to tender document cannot be cross-examined by counsel. That the Appellant in this case cannot claim that his right to fair hearing was denied by the trial court.
2. That the trial court properly evaluated the evidence of the Appellant and Respondent and the Appellate Court cannot interfere with the evaluation of the evidence as there was nothing perverse in the court's findings on the evidence evaluated.
3. That the trial court was right in dismissing the case of the Appellant for want of proof as the said appellant failed to prove his claims.
4. That this court is bound by the Record of Appeal compiled by the trial court. That this court cannot therefore speculate on what transpired at the trial court. That the evidence of the parties at the trial court is what actually transpired at the trial court and nothing more.
5. That there was no miscarriage of justice against the Appellant. He urged the court to so hold, and dismiss the Appeal.

Upon receive of the Respondent's brief, the Appellant filed a reply brief on points on law. Urging the court to discountenance the Preliminary Objection and determine the Appeal as presently constituted in his favour, they Appellant submitted that the

Respondent has waved his right and that the issues raised by the Respondent on the 2 issues for determination have bovver taken by events. He referred to:

ONWUKA Vs. OWOLEWA (2001) 7 NWLR (PT.713) 695 @714.